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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1969

No. 586

ROBERT W. STANLEY,

Petitioner.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT W STANLEY
7014 Willowtree Drive
Palos Verdes, California
Petitioner

JURISDICTIONAL STATEMENT AND OPINION BELOW

This is a federal criminal case in which Petitioner was convicted of a charge of violating Title 18, U. S. C. Sec. 2314, interstate transportation of Stolen securities. On May 9, 1969, The United States Court of Appeals for the Seventh Circuit rendered its decision, which is reported in 411 F. 2d 514. Jurisdiction is involked in this Court pursuant to 28 U. S. C. Sec. 1254 and upon Rule 37(b) Federal Rules of Criminal Proceedure.

QUESTION PRESENTED

The question here presented is whether this Court should exercize its supervisory jurisdiction of lower federal courts where the Appellate Court conceeded it was error for the trial court sitting without a jury to receive and consider inadmissible and highly prejudicial evidence but in effect held the error to be harmless by application of a harmless error rule which is directly in conflict with decisions of this court and other Appellate Circuits. Additionally petitioner asks the Court to reconsider its federal harmless error rule in the light of decisions concerning erroneously admitted "constitutional" evidence.

STATEMENT OF THE CASE

Petitioner is a Los Angeles Lawyer. The case against him consisted of the testimony of two men, legally classified

as accomplices. The Main witness, Robert Morgan, was a man whom petitioner had helped when he was released from prison on parole (and also on bail in a pending appeal). Petitioner paid his way from San Francisco to Los Angeles, helped him rent an office and paid the first month's rent and gave him 50 dollars to pay on the apartment rent for his wife and himself. Morgan was not a client of petitioners although petitioner had represented him in a motion for new trial several years before and had visited him several times in prison or jail.

Morgan's testimony directly implicated petitioner in the stolen secruities transaction in which Morgan became involved within thirty days after his release and which is the basis for the present case in which petitioner was convicted.. Morgan absconded right after this transaction and was arrested five months later in New Orleans on an unrelated charge of forgery. In the meantime the stolen securities transaction had come to light and Morgan knew the F.B.I wanted to question him. It was in New Orleans that Morgan voluntarily called in F.B.I agents and gave two detailed statements implicating Stanley in the transaction.. His Bail was then reduced from $100,000 to $5000. He was subsequently called before the grand jury and testified to the truth of the statements..

At the trial Morgan testified that petitioner had put him up to fencing the stolen stock certificates. His testimony in effect was that he had made all of the arrangements, bought the stock certificates, delivered them and received the money. (There was independant evidence that he had done these things) He stated, however, that he met petitioner each morning early at petitioner's office when no one else was present and discussed

all that was happening and received petitioner's assistance and advise. He also introduced petitioner to Vici Raaf who was a friend of someone he had known in prison. Raaf was a co-defendant in the case. She had introduced Morgan to friends of hers in Chicago to whom Morgan sold the stolen stock certificates. Morgan said that on the morning after he had sold the certificates and received the money he gave Stanley $2000 at Stanley's office with no one else present. He said that he never came around the office after that since he had cheated Stanley out of the one-third he was supposed to get. Instead, he spent a lot of time in Las Vegas gambling and after about thirty days went to Florida and then New Orleans. Morgan was not prosecuted or indicted.

Striffler was merely the burglar who had stolen the stock certificates. He testified in substance that he was introduced to Morgan and Stanley at the same time by his bail bondsman, Dan Major at a party. He said that two weeks later both Stanley and Morgan got in touch with him and asked him if he had any Stolen stocks to sell. They made a deal to purchase them and he had all his subsequent dealings with Morgan. Morgan and he got to be social friends and Morgan told him that he was an attorney working for Stanley. Morgan talked him out of the certificates without paying him, and in fact only paid a small amount later.

There was no direct corroboration of the stories of either Morgan or Striffler. One, Art Steel, testified to seeing Morgan with Stanley at the Hotel which he managed during the same weekend that the stock transaction was made. However, he heard no conversations and his testimony was vague and con-

flicting on dates. Mr Steel also made a courtroom identification of petitioner's attorney as also being at the hotel which the attorney later denied under oath. After the trial, Mr Steel sent a telegram to the Court to the effect that he wasn't sure of the date. At any rate, petitioner didn't deny meeting Morgan at the cocktail lounge of the hotel on two occasions. There was other evidence that Morgan spent most of his time at the hotel.

Morgan confessed in court to being a con artist. His criminal record includes 11 separate felony convictions and he has spent 20 of the last 22 years in various jails and prisons. He acknowledged that he had never told the truth in his life, and every witness in the case, who knew him, said he wouldn't believe Morgan under oath. It turned out that while the statement he gave in New Orleans and the one Striffler gave in Los Angeles both implicated petitioner, they were completely and radically different, as was the grand jury testimony. Morgan changed his testimony right before the trial to conform with Strifflers , and then testified that he simply lied as to 90% of what he testified to before the grand jury.

Striffler, at age 25 has three felony convictions and has served 5 years in prison. He gladly testified that he would lie (whenever I deem it necessary) to help himself. He was not prosecuted in this case and in Los Angeles received immunity for testifying against others.

At the conclusion of the Government's case, and after all the testimony was in on this charge, the Government called as its last witness, one Curtis Ray Michelson. There was no advance notice that he was to be a witness, and he

did not have the remotest connection with the case on trial or with any of the facts involved in the case. He was a former dissatisfied client of petitioner in a criminal case who had complained to the State Bar in an effort to retrieve the money he had paid as attorney fees. Michelson was serving a twenty-two year sentence for robbery and was brought to Chicago solely to testify that he also had had a transaction with petitioner involving stolen travellers checks. This testimony was offered by the Government for the ostensible purpose of showing intent although it was obvious from the nature of the Government's case that intent was not in issue nor could it become in issue. Over petitioner's objection Michelson was permitted to testify in detail about the transaction involving travellers checks which he claimed he had with petitioner. He testified that he met Stanley at the Los Angeles Airport to sign an affidavit and that Stanley solicited securities and traveller's checks from him if he ran across any in his robberies. Several weeks later he met Stanley in his office and asked Stanley if he would be interested in stolen travellers checks. Stanley said he would let him know. Several days later he called and made an appointment to meet at the office. Stanley introduced him to another man also named Robert Stanley and he delivered the checks after arriving at a purchase price. No money was paid. He testified that he later heard that the other Robert Stanley was arrested in Mexico City.

The above statement of the case has not been intended to be argumentative. It was presented this way, pointing up conflicts, in order to show the proper perspective in which the Michelson testimony was received.

REASONS FOR GRANTING THE WRIT

It would be difficult to imagine a case more appropriate than the instant one to point up the need for securing a harmony of decisions and settlement of the question of the standard determining whether clear error is harmless or not in a Federal criminal case. This is particularly true in a non-jury case in view of this Court's decisions in Wong Sun v. United States, 371 U.S. 471, Fahy v. Connecticut, 375 U.S. 85, Chapman v. California, 386 U.S. 18, Fiswick v. United States, 329 U.S. 211, and Kotteakos v. United States, 328 U.S. 750 as well decisions of the Courts of Appeal in several Circuits conflicting with the instant case.

As noted by the Appellate Court in this case, it was error for the District Court to receive the Michelson testimony. Michelson was the last witness to testify for the Government (Tr. 1789), and prior to his testimony the entire case for the Government had been presented. It was obvious at that time that the Government's case against Stanley raised no issue of intent or common plan nor did it leave room for such issues to be raised by the defendant. Michelson's testimony was completely foreign to the case on trial, and consisted solely of a detailed accusation that Stanley had on a prior occasion participated with him in a wholly separate criminal transaction involving stolen traveler's checks. It is clear from a reading of the colloquy between Court and counsel on the objection and the ruling thereon (Tr. 1682-1708) that the Trial Court was mistaken on the law. The Court ruled that it was entitled to consider the testimony and admitted it on the basis of intent. There is no doubt

concerning how much of the testimony was considered by the court, since after the ruling, and with defendant's consent, the Court itself conducted the detailed questioning of the witness on all matters the Court deemed proper.

The issue here is what effect should have been given by the Appellate Court to the error and by what standard should it have been measured. Petitioner submits that the testimony in itself was extremely damning and prejudicial. The record clearly shows that the testimony was not ignored but was in fact considered by the Trial Court as substantially bearing on the guilt of the defendant. At the time of sentencing the Court stated (Tr. Sent. p.58):

> "So, these are the situations where these men get themselves involved with you and instead of trying to help them rehabilitate themselves, you destroy them. They are beyond repair, in some instances. They have become so embittered with life and people and human nature that their lives are completely wasted. That is what you have done in this case, the evidence shows, the sworn testimony of a witness that I believed. You not only encouraged him to go out and steal and burglarize and rob but you shared the proceeds of that.
>
> MR. STANLEY: Who was that ?
>
> THE COURT: That was Michelson. And I believed him. There isn't any question in my mind that he told the truth from that witness stand and there is cooroborating testimony in this record as to what he did and what you did.
>
> So far as the inmate Stanley is concerned, I am satisfied that money was cut up in your office and Stanley went down to Mexico and was arrested and was in jail down there."

A good portion of the trial involved Michelson. His testimony was argued by the Government prosecutor, among other things, as "corroboration of what Morgan says about the way Mr. Stanley operates," (Tr. 3575-3577) and there was never an indication of the Court other than that the testimony was being considered.

In discussing the effect of the error, the Appellate Court notes that if the trial had been to a jury the result might have been otherwise, but since the Court heard the case without a jury, receipt of the Michelson testimony was not reversible error. The rule was stated that in non-jury trials receipt of such evidence over objection is not a ground for reversal where there is other competent evidence sufficient to support the findings. The reason is a presumption that the Judge disregarded and did not consider the erroneously admitted evidence in reaching his decision. No other standard was raised or considered by the Appellate Court for the purpose of determining whether the error was harmless or affected the substantial rights of the defendant.

It is submitted that the above rule, as applied by the Appellate Court in this case, is in direct and substantial conflict with decisions of this Court as well as decisions in other Appellate Circuits. This Court has recently considered the question of harmless error in connection with "constitutional errors" in both jury cases and non-jury cases. In Fahy v. Connecticut, 375 U.S. 85,86 (non-jury case) the Court stated:

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possiblity that the evidence complained of might have contributed to the conviction."

In Fahy, this Court determined from the record that the trial judge had considered the erroneously admitted evidence in arriving at a conclusion and reversed on the basis of the above quoted standard. The "Beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (jury case) was declared to be a restatement of the "reasonable possibility" standard of Fahy in language with which the legal profession was more familiar. The import of these two cases in the present context is that the standard for determining harmless error should not be different in jury and non-jury cases. These cases, in addition, rejected as a harmless error standard the sole consideration of whether the admissible evidence was otherwise legally sufficient. To the same effect is Malinski v. New York, 324 U.S. 401. The Federal Harmless error standard of this Court in two prior cases, Fiswick v. United States, 329 U.S. 211, and Kotteakos v. United States, 328 U.S. 750 (both jury cases), likewise rejected the "otherwise sufficient evidence" standard for determining harmless error. The Court stated in Kotteakos (at page 765):

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In Wong Sun v. United States, 371 U.S. 471 (non-jury case) this Court reversed, presuming that the trial judge considered inadmissible statements from the fact that he had overruled an objection to them and the record otherwise did not disclose that he had not considered them.

In the present case, the Appellate Court in effect found the error involving Michelson's testimony to be harmless by applying a standard for non-jury cases based upon whether or not there was "other independently sufficient evidence". The result was reached by the Appellate Court's application of an old rule from equity cases as being itself the governing standard for determining harmless error, instead of simply a possible aid to determine whether the error was in fact harmless according to recognized harless error standards. The end result is that there was never a factual determination or opinion by the Appellate Court of whether admission of the Michelson testimony was harmless since the application of the rule ended the inquiry. This was done although it affirmatively appeared that the Michelson testimony in fact was not ignored but rather that it was considered and that it influenced the Trial Court. Such a result is not only contrary to the cited decisions of this Court but is also contrary to decisions of other Circuits and to the overwhelming weight of authority. As stated in 3 Am. Jur., Appeal and Error, Sec. 940, p 504:

> "This presumption, however, loses its force when it reasonably appears from an inspection of the record that the incompetent testimony did influence in some degree the action of the trial court in rendering the particular judgment."

In United States v. Chase, 372 F.2d. 453. 4th Cir., 1967, two defendants were on trial together, one by a jury and the other by the trial judge. The Judge erroneously admitted irrevelant evidence and erred in his instructions to the jury concerning it. On appeal, the case was reversed as to the non-jury defendant. Since the judge permitted the jury to consider it, the Appellate Court thought it probable that he himself considered it, thus overcoming the presumption. (See also United States v. Smith 390 F.2d 420, 4th Cir. 1968, same ruling for another non-jury defendant in the same case.)

In Fotie v. United States, 137 F.2d 831, the Court stated:

> "Ordinarily in the trial before a court without a jury, the presumption is that the judge discards immaterial evidence, but that presumption must yield to a showing to the contrary."

The Court went on to reverse where the trial court had admitted inadmissible documents and testimony and then commented at time of sentencing that he had carefully gone through it all and quoted some of it. As in the present case, the Judge also commented on being impressed with the inadmissible testimony.

It is submitted to be inherently unfair to set up as a standard for measuring harmless error a rule whose existence is based upon a presumption that the trial judge has ignored erroneously admitted evidence where the record affirmatively shows that he has not. In fact, the stating of the rule as the Appellate Court has stated it precludes any analysis of whether the presumption is really applicable in the face of the record. Since the consideration of harmless error is

essentially a factual determination at the appellate level, such a rule should be no more than any other presumption, i.e. an aid or assist to the factual determination itself. Such a determination should be made according to a standard which is at least fair to the defendant and preferably in accord with decisions of this Court. The practical effect of the Appellate Court's holding for litigants in non-jury cases is to crystallize into positive law the proposition that it's impossible for the trial court to commit prejudicial and reversible error in a non-jury case arising out of the erroneous receipt and consideration of evidence. This conclusion is strengthened by the Appellate Court's citing of United States v. Bolden, 355 F.2d.453 wherein the defendant claimed that the trial judge was prejudiced toward him and the Court held that an experienced judge must be presumed capable of performing his essential function of impartiality. Such a contention is not involved here. No claim is made that the Judge violated his duty to be impartial. The petitioner only claims that the judge, under a mistaken and erroneous view of the law, received and considered inadmissible testimony which was of itself highly prejudicial. The judge considered this evidence as bearing on the guilt of the defendant, and the record clearly shows that he gave it considerable weight. In addition to singling out Michelson as a witness he believed and was satisfied that he told the truth and found corroboration for his testimony in the record, the Court at the same time stressed the bad character of the two main "accomplice" witnesses stating that it wouldn't convict a dog on their uncorroborated testimony. (Tr. Sent . 59)

The Appellate Court abstractly minimized the effect of this type of error in a non-jury case by assigning as the reason for the exclusionary rule the assumption that the factfinder is unable to appropriately weigh the evidence. As stated by Wigmore:

> "The natural and inevitable tendency of the tribunal--whether judge or jury, is to give excessive weight to the vicious record of crime thus exhibited."
>
> Wigmore on Evidence Sec. 194 (3d Ed.)

This is compounded by the fact that irrespective of the stated purpose for which prosecutors seek the admission of such testimony they are eager in a case such as the present one to bolster their case with this type of evidence. As stated above, the prosecutor here in final argument argued the corroborative effect of Michelson's testimony on the testimony of the key prosecution witness--a point he urged, unsuccessfully, even on appeal.

However, from the standpoint of due process, fundamental fairness, and substantial rights of the defendant, the effect of such evidence and reasons for its exclusion go far deeper. It is a dangerous species of evidence which requires a defendant, without warning or preparation, suddenly to meet and controvert or explain criminal accusations other than those charged against him and for which he is then on trial. Such a one sided affair is patently unfair. As stated by Wharton:

> "In any loose relaxation of the rule, the danger to the accused is that evidence may be adduced of offenses that he has not been called upon to defend, of which, if fairly tried, he might be able to acquit himself."
>
> Wharton, Criminal Evidence, Sec. 360,p. 567

In the present case, as Michelson was called to testify, the defendant informed the judge that Michelson was a disgruntled client who was dissatisfied with the defendant's representation of him and had so complained to the State Bar. He informed the judge that Michelson could not possibly have any knowledge or connection with the case on trial, and that whatever accusation far afield that he might make, the defendant would not be in a position to defend since he had no knowledge or forwarning of Michelson's presence or what accusation he might be going to make. (Tr. 1682–1683)

In response, the trial judge stated that " . . .I can assure you that if his testimony isn't relevant and material and there is an objection made, that it will be sustained." The objection was made, but was overruled. It is submitted that the receipt and consideration of the testimony for any purpose going to the guilt of the defendant, as was done here, was error. The effect of the error was to place before the trier of fact matters upon upon which the defendant had little chance to defend and upon which the court attached significant weight.

Lastly, it is urged that this Court should re-examine the various federal harmless error standards in the light of the Court's decisions in Fahy, Chapman and Wong Sun (all above cited). It is submitted that when analyzed from the standpoint of the nature of the error and its effect upon the substantial rights of the defendant, there is no reason why there should in federal cases be a different harmless error rule for erroneously admitted "constitutional" evidence than for erroneously admitted "non-constitutional" evidence. As stated by Mr. Justice Harlan in Fahy:(dissenting opinion)

"The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case."
(P. 94 U.S.)

This should be qualified only by those classes of "constitutional" errors to which harmless error standards do not apply or are limited for special policy reasons. It is urged that the court adopt the rule of Chapman v California, 386 U.S. 18 as the harmless error rule in Federal Cases and require the beneficiary of the error to show beyond a reasonable doubt that the error did not contribute to the verdict obtained. Certainly that's not an unfair burden upon the Government in a criminal case such as the present one where it was the Government that deliberately introduced the highly prejudicial and totally disconnected evidence for the very purpose of bolstering a case involving questionable witnesses and lack of direct corroboration.

CONCLUSION

For the foregoing reasons Petitioner respectfully prays that the Court issue its order granting a Writ of Certiorari to the Court of Appeals for the Seventh Circuit so that this case may be heard by the Court on its merits.

RESPECTFULLY SUBMITTED

ROBERT W. STANLEY
Petitioner

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OPINION BELOW

UNITED STATES of America
Plaintiff-Appellee,
v.
Robert W. STANLEY, Defendant-
Appellant.
No. 16472

United States Court of Appeals
Seventh Circuit
May 9, 1969

Rehearing Denied July 11, 1969

Before DUFFY, Senior Circuit Judge, KILEY and SWYGERT, Circuit Judges.

DUFFY, Senior Circuit Judge.

In prosecuting this appeal, defendant has appeared pro-se. He practiced law in the State of California and, apparently, had considerable trial experience. On this appeal, his main brief of sixty-three pages, and his reply brief of sixty-four pages were well prepared and evidenced a considerable degree of legal skill. However, in the trial below, he was represented by his personally selected counsel.

Defendant Stanley was convicted in a bench trial upon the

charge of violating Title 18, U. S. C. Sec. 2314, interstate transportation of stolen securities. It was the theory of the Government that the defendant helped procure the commission of the offense within the meaning of Title 18, U. S. C. Sec. 2.

The indictment, as originally returned, charged Stanley, together with one Raaf and one Dillon, in Count 1. It also charged Dillon alone in several counts involving separate transactions.

The Court severed Count 1 from the remaining Counts. Prior to trial, Dillon entered a plea of guilty to Count 1 and testified for the Government. Appellant and Raaf went to trial and both were found guilty. Raaf was placed on probation and did not appeal.

Stanley makes three assignments of error--1) admission of evidence for the purpose of showing he had committed a prior criminal offense; 2) alleged misconduct of Government counsel pertaining to a certain alleged confidential exhibit, and 3) failure to sever Stanley from codefendant Raaf.

The defendant strongly urges that it was prejudicial error for the trial court to admit, over objection, the testimony of Curtis Ray Michelson who had a long criminal record.

Michelson, a convicted bank robber whom defendant Stanley had represented on appeal, testified that he had a number of conversations with Stanley in July and August 1965 regarding the obtaining by defendant of securities that had been stolen by Michelson and also as to the disposition of such securities by the defendant. The Government tendered the testimony

both to show intent and to show a similar design and pattern of conduct. The trial court admitted the evidence as bearing on the issue of defendant's intent.

Michelson testified that in April or May 1965, he retained Stanley to prosecute an appeal for him in a bank robbery case in California. Further, that in July 1965, Stanley told him that if he ever ran across any securities, bonds or travellers checks in his bank robberies, appellant could take care of them. Michelson further testified that on or about August 1, he had a similar conversation with the defendant; that on August 4 or 5, he brought to defendant Stanley's office $37,000 of stolen travelers checks. Stanley introduced him to another man in the office. Both Stanley and the other man said that they could get rid of the travelers checks in Chicago, Mexico City or Tokyo.

Defendant cites United States of America v. Magee, 7 Cir., 261 F.2d. 609,611 where we stated "The general rule is that evidence that accused has committed another crime independent of, and unconnected with, the one on trial is inadmissible; it is not competent to prove one crime by proving another." However, we emphasized in that case that there are a number of exceptions to the general rule.

The trial judge here admitted the Michelson testimony only with reference to proving the element of intent, which is one recognized exception. The foundation for the rule which the defendant seeks to invoke is not that the evidence of a prior crime is not relevant to prove the defendant did the act charged,

but rather that its probative value is outweighed by its prejudicial effect.

This conclusion is based upon the assumption that the factfinder is unable to appropriately weigh the evidence. Hence, if this had been a jury trial, the admission of the Michelson evidence might well have been held error.

The Government introduced evidence to the effect that the appellant and two others met and discussed arrangements for a transaction involving the sale of stolen securities. If the testimony were believed there was no apparent possibility that defendant would later argue that he was part of the conversation but did not realize the securities were stolen. Due to the nature of the conversation, this was simply inconceivable. In fact, defendant later denied the allegation that he was involved in any such conversation. The Government argues that intent was an element of the crime which they were obligated to prove, and therefore that exception to the prior crimes rule was available to them. The prior crime was introduced as part of the Government's case-in-chief.

It has been stated by Lord Sumner in Thompson v. The King, (1918), App. C. 221, 232: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything in issue is not enough for this purpose. The prosecution cannot

credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice."

In State v. Gilligan, 92 Conn. 526, 103 A. 649, 653, the Court pointed out that it violated the policy of the criminal law to permit evidence admissible solely to characterize an equivocal act when, in fact, the act alleged, under the facts of the case, was not equivocal. It would appear that a more appropriate procedure in this case would have been to deny the admission of the evidence until such time as the defendant attempted to cast some doubt on the issue of knowledge or intent in doing the act alleged (although it is difficult to even conceive of such a defense in view of the Government's case.) See generally McCormick on Evidence, Sec. 157, 1954 Ed.

But here the trial was to the Court. It is a well-established rule in most appellate courts that the admission of incompetent evidence over objection will not, ordinarily, be a ground for reversal if there was competent evidence sufficient to support the findings, since the judge will be presumed to have disregarded the inadmissible and relied on competent evidence. McCormick on Evidence, Sec. 60 (1954 Ed.). Alexander v. United States, 241 F.2d. 351 (8th Cir.).

In a very recent case, United States v. Menk, 406 F.2d. 124 (7 Cir., November 21, 1968), this Court stated: "We therefore hold that the admission of such evidence constituted error, and if this had been a jury trial we would be compelled to reverse. (Citing cases). However, since this was a bench trial and since it appears from the record that the trial judge

did not consider the erroneously admitted evidence in reaching his findings of fact, we hold that the error does not justify reversal."

In that case we further stated, "Although, we cannot probe the mind of the trial judge any more thoroughly, we likewise cannot presume error by inferring that he considered the improperly admitted evidence in reaching his findings."

In Menk, supra, we quoted from United States v. Bolden, 355 F.2d. 453 at 456, cert. den. 384 U. S. 1012, 86 S.Ct. 1919, 16 L.Ed.2d 1018: "Trial judges are invariably called upon to conduct impartial trials despite whatever opinion they may have or which they may formulate during the course of the trial concerning the guilt or innocence of an accused. Such impartiality is precisely what is expected of them, and an experienced trial judge must be assumed capable of performing his essential function. In short, prejudice must be shown by trial conduct; it may not be presumed or inferred from the subjective views of the judge."

The case at bar was tried by an able and long experienced judge, and he must be presumed to have exercised the proper discretion in distinguishing between the improper and proper evidence at the trial.

We hold there was no reversable error due to the receipt of the Michelson testimony.

. . . . . (The following six paragraphs of the opinion are omitted since they pertain solely to assignments of error

raised below which are not pertinent to nor raised by this petition.) .....

The judgment of the District Court is Affirmed.